IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-174

N.W. ZACK METAL COMPANY,

Petitioner,

vs.

S.S. SEVERN RIVER, JANSEN & CO.,
CONTAM LINIE, and HANS H. JANSEN,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LUM, BIUNNO & TOMPKINS,
Attorneys for Respondent,
International Navigation Company
of Monrovia, Liberia,
550 Broad Street,
Newark, New Jersey 07102

WILLIAM B. MCGUIRE
On the Brief

N.J. Appellate Printing Co., Inc., So. Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED:

TABLE OF CONTENTS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-174

N.W. ZACK METAL COMPANY,
Petitioner,

vs.

S.S. SEVERN RIVER, JANSEN & CO., CONTAM LINIE, and HANS H. JANSEN,
Respondents.

Brief for Respondent in Opposition to Petition for a Writ of Certiorari

---

OPINIONS BELOW

Both the opinion of the District Court and its Order upon petitioner's Motion for Reargument were unreported, but are included in Appendices B and C of the Petition for Certiorari. The Judgment Order of the United States Court of Appeals for the Third Circuit was also not reported and is included in the Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioner's Brief misstates the nature of the legal issue, or issues, sought to be reviewed. The only real issue before this Court is whether the United States Court of Appeals for the Third Circuit has rendered a decision in conflict with the decision of another court of appeals on the same matter. The only other possible issue before this Court is whether the District Court properly refused to vacate the previous order of dismissal and reopen the case and restore it as an active matter pursuant to Fed. R. Civ. P. 60(b)(5).

STATUTES INVOLVED

The only federal statute applicable to this case is 46 U.S.C. 1303(6).

STATEMENT OF THE CASE

The procedural history of this litigation and of the other suits based on the same cause of action are set forth in footnote 5 of the District Court's opinion (Appendix B to Petition). However, it should be noted at this juncture that the respondent herein, International Navigation Company of Monrovia, Liberia [hereinafter International] is not a party to this suit. Rather, International was put on notice of these proceedings at the direct request of the District Court. Having received notice, International appeared through counsel solely for the purpose of opposing the motion to reopen the case and to add it as a party defendant. International filed its brief in opposition to petitioner's appeal to the United States Court of Appeals for the Third Circuit in that same capacity. On the within Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, International, while still not a party to this suit, again appears for the limited purpose of arguing in opposition thereto.

ARGUMENT

Point I

There is no conflict of authority.

The District Court based its decision entirely upon Fed. R. Civ. P. 15(c) and the one year statute of limitations contained in the Carriage of Goods by Sea Act, 46 U.S.C. §1303(6). The Petition for a Writ of Certiorari completely fails to set forth any grounds pertaining to Fed. R. Civ. P. 15(c) that meet the threshhold character of the reasons enunciated in Supreme Court Rule 19 pertaining to the considerations governing review on certiorari. The Supreme Court has recognized in the past the criteria to be applied in determining whether a particular case merits consideration. Thus, in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1954), it was stated at 349 U.S. 74:

> "Special and important reasons" imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

While this Court has noted that the considerations listed in Supreme Court Rule 19 neither control nor fully measure the Court's discretion, it has been repeatedly noted that compelling grounds must exist for the Court to grant a writ. Accordingly, in *Layne & Bowler Corp. v. Western Well Works, Inc., et al.*, 261 U.S. 387, 67 L.Ed. 712, 43 S. Ct. 422 (1923), Mr. Chief Justice Taft squarely addressed this point at 261 U.S. 393:

> . . . the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

The Petition under consideration is noteworthy in its failure to allege that the interpretation given Fed. R. Civ. P. 15(c) by the District Court and the subsequent affirmance of that interpretation by the United States Court of Appeals for the Third Circuit is in conflict with a decision of any other court of appeal. The only vague claim of some type of conflict set forth by petitioner relates to a misconceived perception that certain circuit courts do not distinguish between an *in rem* and an *in personam* action (Pet., pp. 35, 36 and 39)*. The cases cited by petitioner in no way indicate any such conflict.

The case of *Construction Aggregates Corp. v. S.S. Azalea City*, 399 F. Supp. 662 (D. N.J. 1975) did not even deal with the question of the distinction between *in rem* and *in personam actions*. That case involved a defense motion to transfer to another district court. The motion was granted as the court felt the transfer to be in the interest of justice as the defendants had agreed to admit *in rem* jurisdiction of the transferee court and on several other nonmaterial grounds.

Continental Grain Co. v. Barge F.B.L., 364 U.S. 19, 4 L.Ed.2d 1540, 80 S. Ct. 1470 (1960), also cited by petitioner in support of his claim that there exists no difference between an *in rem* and an *in personam* cause of action, actually notes at 364 U.S. 22-23 that it is "a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a law suit and enforcing a judgment." Moreover, that case dealt only with the distinction between *in rem* and *in personam* actions for the purposes of transferring an action from one court to a more convenient forum.

* Citations to the Petition for a Writ of Certiorari in this case are designed "Pet." followed by the page numbers.

Hamilton v. Canal Barge Company, Inc., 395 F. Supp. 978 (E.D. La. 1974) also fails to support petitioner's contention that there exists some type of conflict between the courts of appeal on this point. That case involved wrongful death claims brought against various parties including a vessel owner, a marine company which chartered the barge from its owner, and the corporation which subdemised the barge. The pertinent portion of the court's holding was that as between a vessel owner and an innocent seaman, the vessel owner who charters his vessel should be liable where circumstances justifying his liability exist. The court further pointed out that where an admiralty libel has been brought against the vessel owner and an *in rem* action against the vessel, the distinction between liability *in rem* and *in personam* becomes blurred. However, in the case *sub judice* only an *in rem* action was initially brought against the S.S. *Severn River* and now some fifteen years later, petitioner seeks to bring an *in personam* claim against International, the owner.

Norfolk Ship. & Dry. Corp. v. M/Y LaBelle Simone, 371 F. Supp. 985 (D.P.R. 1973), incorrectly cited in the Petition as appearing at 375 F. Supp. 985, is the only other case cited by petitioner in support of its position that some type of conflict exists and is totally irrelevant to the case at bar.

The only other basis for the conflict claimed by petitioner is that there exists disagreement among the courts of appeal as to whether the commencement of a suit against either an owner or the vessel itself defeats a claim of time bar under the Carriage of Goods by Sea Act as to the other (Pet., p. 35). None of the three cases cited in support of this proposition are relevant to the instant case as all dealt with instances wherein suit was initiated against parties within the statutory limitation period but process could not be served until after the statute of limitations had run.

United Nations Relief and R. Adm. v. The Mormacmail, 99 F. Supp. 552 (S.D. N.Y. 1951) held that suits brought *in rem* and *in personam* were within the one year statutory period of the Carriage of Goods by Sea Act although process was not issued and served until after the statutory period.

In *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955), the United States Court of Appeals for the Fourth Circuit similarly held that the initiation of a suit against a party constitutes a bringing of suit within the required limitation period set forth in the Carriage of Goods by Sea Act, even though process is not issued until after expiration of the period.

Finally, the case of *Ore Steamship Corp. v. D/S A/S Hassel*, 137 F.2d 326 (2d Cir. 1943) held that *in personam* and *in rem* suits were timely brought within the one year statutory period of the Carriage of Goods by Sea Act although process was not issued until after one year had run.

Thus, none of the cases cited by petitioner evidences a conflict of authority between circuits. They are clearly distinguishable from the case at bar on two grounds. Initially, all three cases involved suits in which the courts found the one-year statute of limitations of the Carriage of Goods by Sea Act inapplicable because the suits against the parties had been initiated within the one year period. No attempt was being made to add an owner as an additional defendant through an *in personam* action some 15 years after an *in rem* action had been originally filed. Secondly, to the extent the one year statutory limitation period was found to be inapplicable, all three cases involved attempts to gain service of process on a named defendant after the expiration of the one year statutory period in a suit filed within the one year period. No attempt was

made to add an additional defendant after the expiration of this one year period. None of these cases involved a determination as to whether the filing of a suit *in rem* is the equivalent of the filing of a suit *in personam* for purposes of the Carriage of Goods by Sea Act's period of limitations.

Thus, it is readily apparent that it cannot be said that the Court of Appeals decided a federal question in such a way as to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. Petitioner has therefore wholly failed to sustain its burden of establishing grounds under Supreme Court Rule 19 as to why the writ should be granted.

Point II

The decision below is clearly correct.

Although the District Court did not reach the merits as to whether or not Petitioner, pursuant to Fed. R. Civ. P. 60(b)(5), might vacate the Order of Dismissal entered previously by the District Court, it is respondent's contention that no such basis existed. It is also noteworthy that in petitioner's brief no basis is asserted as to what special and important reasons might exist pursuant to Supreme Court Rule 19 as to why a writ should be granted in regard to the District Court's failure to vacate the previous order of dismissal pursuant to Fed. R. Civ. P. 60(b)(5).

This case was originally dismissed in 1964 pursuant to General Rule 12*, the predecessor to General Rule 30, for failure to prosecute. Such dismissals are discretionary with the trial court and any motion to reopen a judgment

* The Rules of the United States District Court for the District of New Jersey.

of dismissal pursuant to Fed. R. Civ. P. 60(b) is also discretionary with the trial court. *Spering v. Texas Butadiene and Chemical Corp.*, 434 F.2d 677 (3d Cir. 1970); *Wagner v. Pennsylvania R. Co.*, 282 F.2d 392 (3d Cir. 1960). Such judgments are to be set aside only in exceptional circumstances. *F.D.I.C. v. Alker*, 234 F.2d 113, 116-17 (3d Cir. 1956). Additionally, a District Court's denial of a Fed. R. Civ. P. 60(b) motion to reopen should not be set aside unless, under the circumstances of a case, such denial is a clear abuse of discretion. *Giordano v. McCartney*, 385 F.2d 154 (3d Cir. 1967). No such showing has been made by the petitioner during the course of these proceedings.

A review of Fed. R. Civ. P. 60(b)(5) indicates that it is not applicable to this case. The Petitioner originally moved under Fed. R. Civ. P. 60(b)(5) for relief on the grounds that "it is no longer equitable that the judgment have prospective effect." An Order of Dismissal is not a judgment having prospective effect.

Additionally, even if the dismissal order did have "prospective effect" relief is not available to petitioner as any relief sought under Fed. R. Civ. P. 60(b) must be requested within a "reasonable time." *Delzona Corp. v. Sachs*, 265 F.2d 157 (3d Cir. 1959). Petitioner has attempted to assert throughout its Petitioner that process was not originally served on International because it was not within the jurisdiction of the District Court. Now, it contends that long-arm service is available upon the ship owner's agent. This argument is without merit since such "long-arm" service was available to petitioner since at least 1958 (see Fed. R. Civ. P. 4(e)(i) and New Jersey *R.R.* 4:4-5 (1958)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM B. McGUIRE

LUM, BIUNNO & TOMPKINS
Attorneys for Respondent,
International Navigation
Company of Monrovia, Liberia

550 Broad Street,
Newark, New Jersey 07102